IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9046 of 1997

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JC PARMAR

Versus

GUJARAT PUBLIC SERVICE COMMISSION

Appearance:

MR PARESH UPADHYAY for Petitioner No. 1

MR LR PUJARI for Respondent No. 1

MR KP RAVAL, AGP for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 16/09/2004

CAV JUDGEMENT

1.0 In this petition the petitioner has prayed for a direction to quash the decision of the Gujarat Public Service Commission of rejecting the candidature of the petitioner for the post of Assistant Engineer (Civil),

communicated to the petitioner vide its order dated 1st August 1997 and to accept the candidature of the petitioner for the post of Assistant Engineer (Civil).

2.0 The facts in a nutshell as emerging from the record of the petition are as under:

2.1 When the petitioner was in school the father of the petitioner died in harness and therefore the petitioner was taken up as Junior Clerk on compassionate grounds. At that time he was doing his Higher Secondary and after the job was offered he was constrained to leave his studies in order to accept the job and to look after the family. According to the petitioner, he always wanted to study further and since he was employed in the office of Engineers of the State of Gujarat, he thought it fit to go for Civil Engineering Course. However, since he had passed SSC examination with commercial Arithmetic and not with Mathematics and Science subjects, he could not apply for diploma in Civil Engineering Therefore he again appeared in the SSC examination with Mathematics and Science subjects and cleared the same with good marks. On the basis of this educational qualification the petitioner applied for Diploma in Civil Engineering Course, got admission, and passed the same in the year 1986. Thereafter on the basis of his diploma in Civil Engineering, the petitioner appeared in the Entrance Test for admission in the course of B.E. (Civil) in M.S.University of Baroda. After passing in the Entrance Test the petitioner was admitted in B.E. (Civil) Course and the petitioner cleared the B.E. (Civil) examination in the year 1994.

2.2 The Gujarat Public Service Commission had given public advertisement on 30.04.1996 for the post of Assistant Engineer (Civil) under Narmada and Water Resources Department. The said advertisement was published as a special advertisement No.6 of 1996 to fill up the backlog of posts reserved for Scheduled Caste and Scheduled Tribe. 22 posts were reserved for Scheduled Caste candidates and 230 posts were reserved for Scheduled Tribe candidates. The petitioner is a Scheduled Caste candidate.

2.3 As per the advertisement the essential qualification for the post is B.E. (Civil) and the incumbent should not be more than 33 years of age as on 30.4.1996. However, the candidates who are servants of the Government of Gujarat are given age relaxation as per the provisions of Gujarat Civil Services Classification and Recruitment (General) Rules, 1967.

2.4 The date of birth of the petitioner is 1.6.1962 and he is possessing the degree of B.E. (Civil). The petitioner is working as Junior Clerk in Narmada and Water Resources Department of Government of Gujarat since 16.8.1979. When the petitioner was appointed as Junior Clerk he was within the upper age prescribed for the post of Junior Clerk.

2.5 Since the petitioner is possessing all the criteria prescribed in the advertisement, he had applied for the aforesaid post. The petitioner was called for viva voce vide letter dated 13.12.1996, wherein it was specifically mentioned that the petitioner was required to produce No Objection Certificate at the time of interview. Accordingly the petitioner had produced the No Objection Certificate from his employer at the time of interview which was accepted by the respondents.

2.6 After due process of selection, the result was published by the Gujarat Public Service Commission and the same was placed on the Notice Board of the GPSC. In the said list the name of the petitioner was shown at serial no.7 in the select list. In the entire list in all 14 candidates belonging to Scheduled Caste were declared successful. In pursuance of the same the name of the petitioner was recommended by the GPSC to Government of Gujarat for appointment and the said information was given by the GPSC to the petitioner vide letter dated 25th March 1997.

2.7 According to the petitioner, in the month of June 1997 he came to know that Government has already issued appointment orders to the persons recommended by the GPSC and the name of the petitioner was not included in the appointment order issued by the Government. On inquiry the petitioner was orally informed that the petitioner was overaged and therefore the petitioner could not be appointed.

2.8 The petitioner made a representation to the Government as well as to GPSC on 23.6.1997 stating that the petitioner cannot be dropped on the ground that the petitioner is overaged. The petitioner also made a further representation on 22.7.1997 to the authorities. According to the petitioner he can get benefit of the age relaxation which is available to the Government employees as per the Rule 8(5) and 8(5-A) of the Gujarat Civil Services (Classification and Recruitment) General Rules, 1967.

2.9 The petitioner received a communication from GPSC dated 1.8.1997 whereby it was communicated to the petitioner that the petitioner is not eligible for age relaxation under Rule 8(5) of the said Rules and therefore the candidature of the petitioner was cancelled and the recommendation which was made to the Government also stood cancelled.

2.10 It is under the aforesaid circumstances the petitioner has approached this Court by way of the present petition.

3.0 Mr. Paresh Upadhyay, learned counsel for the petitioner has contended that the advertisement specifically states that those who are servants of Gujarat Government servants, are eligible for age relaxation as per Rule 8 of The Gujarat Civil Services Classification and Recruitment (General) Rules, 1967. Therefore the petitioner was wrongly denied the benefit of Rule 8(5) of the said Rules. He submitted that when the petitioner is eligible for age relaxation as per Rule 8(5-A)(1) of Gujarat Classification and Recruitment (General) Rules, 1967, there was no reason for the respondents to reject the candidature of the petitioner.

3.1 Mr. Upadhyay further submitted that it is the policy of the Government to see that all efforts are taken to clear backlog of vacant post of Scheduled Caste and Scheduled Tribe. The Government had made relaxation in recruitment rules also to see that the adequate number of candidates are made available. In spite of this policy, the denial of appointment to the petitioner is against the policy of the Government.

3.2 Mr. Upadhyay submitted that whenever some relaxation is to be given to any candidate, first it should be given with regard to age, then with regard to experience and as a last course with regard to educational qualification. The petitioner being a Scheduled Caste candidate, he has not asked for relaxation of experience or educational qualification. He has requested for age relaxation by a few months which should have been granted by the respondents. According to him, on true interpretation of Rule 8(5) of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967,it is clear that the petitioner is eligible for being considered for the post in question.

3.3 Mr. Upadhyay submitted that in the present case there were 22 posts reserved for Scheduled Caste candidates and the Select List included only 14 candidates belonging to Scheduled Caste which clearly

shows that adequate number of candidates belonging to Scheduled Caste are not available to the Commission and therefore the posts reserved for Scheduled Caste will go unfilled on the ground that eligible candidates are not available. Therefore looking to the overall facts and circumstances the petitioner should have been given the appointment on the post reserved for Scheduled Caste candidate.

3.4.1 Mr. Upadhyay submitted that when the petitioner was in school his father died in harness and therefore the petitioner was taken up as Junior Clerk on compassionate grounds. He has taken up the job when he was doing his higher secondary in order to support his family. Therefore, he had no option but to accept the job to maintain his family by abandoning his studies. In spite of this position because of the zeal to study further and to try for public employment on the basis of the superior educational qualification, the petitioner had approached his teachers and friends and on their advice he had gone for Dimploma Certificate on the basis of his SSC certificate.

3.4.1 The petitioner was employed in the office of Engineers of the State of Gujarat and therefore he thought it fit to go for Civil Engineering Course. However, since he had passed his SSC examination with commercial Arithmetic and not with Mathematics and Science subjects, he could not apply for diploma in Civil Engineering Course. Therefore he again appeared in the SSC examination with Mathematics and Science subject and cleared the same with goods marks. On the basis of the said educational qualification he had applied for Diploma in Civil Engineering Course and later on passed in the same in the year 1986. On the basis of his diploma in Civil Engineering, the petitioner appeared in the Entrance Test for admission in the course of B.E. (Civil) in the M.S. University of Baroda. The petitioner passed in the same and he was admitted in B.E. (Civil) Course and the petitioner cleared the B.E. (Civil) examination in the year 1994. After the petitioner got his B.E. (Civil) degree the petitioner applied for the post in question and got selected in the same. In the background of these facts, Mr. Upadhyay submitted that looking to the facts and circumstances and in view of the fact that the petitioner hailing from Scheduled Caste community, his case should have been considered by the respondents.

4.0 Mr. L.R. Pujari, learned Advocate for GPSC submitted that as per the Gujarat Civil Service

Classification Recruitment (General) Rules, 1967, Rule No.8(5)(2), the age relaxation shall be admissible to such Government servants who are working on the posts which are in the same line and where a relationship could be established that service already rendered in a particular post shall be useful for the efficient discharge of the duties of the post for which advertisement has been issued. According to him, "the post in the same line" means such next lower post from which an employee can be promoted to the post so advertised. He submitted that the post of Junior Clerk is not such post next lower post from which an employee can be promoted as an Assistant Engineer (Civil).

4.1 Mr. Pujari submitted that proviso 3 to sub-rule (5-A) of the Gujarat Civil Service Classification and Recruitment (General) Rules, 1967 clearly indicates that the relaxation admissible in upper age limit under sub rule (1) above shall be in addition to the relaxation in upper age limit admissible to the candidates belonging to the SC, ST and SEBC read with proviso 2 of sub rule 5(A) of rule 5.

5.0 Affidavit in reply has been filed on behalf of the State Government stating that the petitioner was overaged and that the nature of employment of Junior Clerk is administrative and as such the candidate is not entitled to age relaxation as per the second proviso to Rule 5.

5.1 Mr. K.P. Rawal, learned AGP, submitted that in view of the provisions contained in sub-rule 5, the Government has reexamined the case of the petitioner and found that he is not entitled to age relaxation inasmuch as the petitioner held the post of Junior Clerk which is an administrative post and the qualification of this post does not require a Medical Engineering or Agricultural degree or diploma. He further submitted that the representation of the petitioner dated 23.6.1997 and 22.7.1997 have been considered by the Government. He submitted that in view of the above, the Government has cancelled the name of the petitioner from the select list.

5.1 Learned counsel for the respondent relied upon a decision in the case of Ajit K. Shahani and Another Vs. Gujarat Public Service Commission & Another, reported in 1986 GLH 352 wherein it is held as under:

"In order to attract application of the second proviso to Sub-rule (5) of Rule 8 of General

Rules, three conditions must be fulfilled, namely (1) the candidate is holding a post requiring medical, engineering or agricultural degree or diploma, (2) he was within the age limit when appointed to such post and (3) the post for which the candidate has applied is also a post requiring medical, engineering or agricultural degree or diploma. A person holding the post requiring medical, engineering or agricultural degree or diploma, is not entitled to the benefit of this provision only in case he applies for same or equivalent post requiring medical, engineering or agricultural degree or diploma. The expression "any such post" used in the proviso can only mean post requiring medical, engineering or agricultural decree or diploma and not the same or equivalent post. In fact before the said provision was amended, the expression used was "same post" but this expression was substituted by "any such post" making it clear that the application has to be for a post requiring medical engineering or agricultural degree or diploma. Therefore, if a person holding a post requiring medical,engineering or agricultural degree or diploma applies for another post which also requires medical, engineering or agricultural degree or diploma, he is entitled to relaxation of upper age limit under the second proviso to Subrule (5) of Rule 8."

5.2 Learned counsel for the respondent also relied upon a decision of this Court in the case of Ajit K.Shahani Vs. GPSC, reported in 1986(10) GLR 347, wherein it is held as under:

"There is nothing in the rules to suggest that the requisite qualifications must be acquired before the candidate reaches the upper age limit. It is not disputed that the petitioners acquired the requisite qualifications after attaining the age of 30 years which is the upper age limit for the post of Assistant Town Planners. However, there is no provision in the General Rules which lays down that the candidate should have acquired requisite qualifications before attaining or reaching the upper age limit. The second proviso to sub-rule (5) of rule 8 of the General Rules would apply irrespective of the fact as to when the requisite qualification is acquired provided the other conditions laid down in sub-rule (5)

are satisfied."

5.3 In my opinion, in the aforesaid decisions the Court had decided only Rule 8, sub-rule (5) and the Court had no occasion to consider sub-rule (5-A) (1) to (3) as also Rule 16B. The present case is required to be decided on the basis of the aforesaid rules and therefore, the aforesaid citations are of no useful to the respondents.

5.4 Mr. L.R. Pujari, learned counsel for the respondent, has relied upon a decision in the case of All India Judges' Association and others Vs. Union of India and others, reported in (1998)8 SCC 771. In that decision it is held that the Legal Assistants cannot be treated to be having experience "at the Bar" because they do not get experience and exposure which is important for the purpose of manning judicial posts. He submitted that the petitioner has no experience in the field and therefore his case cannot be accepted. In this context, it is to be noted that it is not the case of the respodent that only experienced persons are posted on the post of Assistant Engineer. There is a direct recruit to the said post and therefore the aforesaid decision would be of no assistance to the respondent.

6.0 I have perused the relevant documents on record of the petition. In the advertisement it is stated that the age will be calculated as on 30.4.96 and age relaxation available as per rules. The age limit for the post is 28+5 = 33 years i.e. not more than 33 years. Rule s 8(5) and 8(5-A)(1) of the said Rules read as under:

"(5) Notwithstanding anything to the contrary contained in any rules for the time being in force relating to the recruitments to any service or post the upper age limit for the purposes of recruitment prescribed in such rules shall not apply to a candidate who is already in Gujarat Government Service either as permanent Government Servant or as a temporary Government Servant officiating continuously for six months in a substantive or leave vacancy or in a vacancy caused as a result of deputation of other servants and was within the age limit prescribed for the post at the time of his first appointment in Government Service. Provided that such upper age limit shall apply to such candidate in a case where recruitment to a post or service is done through competitive examination or by direct

selection for which experience has not been prescribed as one of the qualifications for such post.

"Provided further that where a post requiring a medical engineering or veterinary or agricultural degree or diploma as a qualification is to be filled by direction selection through the Public Service Commission, a Government Servant who was within the age limit when appointed to such post shall, if he subsequently applies for any such post be entitled to relaxation from the application of the upper age limit prescribed as aforesaid, even if experience has not been prescribed as one of the qualifications for such post.

"(5-A)(1)Government servants may be allowed on a uniform basis, relaxation of a minimum period of 5 years or to the extent of equal number of Years for which service has been put in by him, whichever is less, in the upper age limit for recruitment to class-I or Class-II posts or service, which is to be filled in by direct selection through the Commission for which experience has not been prescribed as one of the qualifications for such post."

(2) The age relaxation shall be admissible to such Government servants who are working in posts which are in the same line and where a relationship could be established that the service already rendered in a particular post shall be useful for the efficient discharge of the duties of the post(s) recruitment to which has been advertised. The decision of the Commission in this regard shall be final.

Provided that a post in the same line means such next lower post from which an employee can be promoted to the post so advertised.

(3) The relaxation admissible in upper age limit under sub-rule (1) above, shall be in addition to the relaxation in upper age limit admissible to the candidates belonging to Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes."

6.1 Learned counsel also relied upon "Rule 16B:

Savings" of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 which reads as under:

"16.B. Savings: Nothing in these rules or any rules or orders relating to recruitment in or promotion to any service or posts included in the State Services or Subordinate Services shall affect any orders made by the State Government relating to:

(a) reservations to be made in that service or in relation to those posts in pursuance of clause (4) of article 16 of the Constitution,

(b) relaxation of age limit, and

(c) other concessions.

In respect of persons belonging to the Scheduled Castes, Scheduled Tribes and other backward classes in the State."

7.0 Rule (5-A)(1) clearly stipulates that government servants may be allowed on a uniform basis, relaxation of a minimum period of 5 years or to the extent of equal number of years for which service has been put in by him, whichever is less, in the upper age limit for recruitment to class-I or Class II posts or service, which is to be filled in by direct selection through the Commission for which experience has not been prescribed as one of the qualifications for such post. Sub-rule (3) states that the relaxation admissible in upper age limit under sub-rule (1) shall be in addition to the relaxation in upper age limit admissible to the candidates belonging to scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes. Thus, the relaxation is available independently to candidates belonging to Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes. The petitioner hails from Scheduled Caste community. Therefore a combined reading of Rules (5-A)(1) and (3) it is clear that the petitioner is entitled to age relaxation.

7.1 Apart from the above, Rule 16-B Savings also carves out a distinction to the effect that nothing in the said rules or any rules or orders relating to recruitment in or promotion to any service or posts included in the State Services or Subordinate services shall affect any orders made by the State Government relating to relaxation of age limit. In view of this

provision the respondents cannot take the plea of conditions contained in Rule (5-A)(2). A combined reading of Rules (5-A)(1), (3) and Rule 16-B, it is clear that nothing would prevent the respondents in considering the case of the petitioner for appointment by relaxing the age. Therefore, it is clear that the respondents have not exercised their discretion on the facts of the case.

7.2 It is required to be noted that the special advertisement was published to fill up the backlog of posts reserved for Scheduled Caste and Scheduled Tribe. 22 posts were reserved for Scheduled Caste candidates. Thus the very purpose of the advertisement was to fill up the posts with Scheduled Caste and Scheduled Tribe candidates. It is pertinent to note that the select list included only 14 candidates belonging to Scheduled Caste. Therefore it is clear that adequate number of candidates belonging to Scheduled caste are not available to the Commission and therefore the posts reserved for Scheduled Caste would go unfilled for want of eligible candidates. Therefore, in my opinion, when the object is to clear up the backlog of posts reserved for Scheduled Caste and Scheduled Tribe and when the petitioner is even otherwise eligible to be appointed on the post, considering the aforesaid rules the respondent authorities ought to have exercised their discretion in relaxation of age.

7.3 From the facts of the case it is clear that the petitioner strived hard to get B.E. (Civil) Certificate while he is serving as Junior Clerk and looking after his family. This is one more criterion to assess the ability of the petitioner, especially when he is hailing from the community of Scheduled Caste. In such circumstances, the appointment of the petitioner would have been certainly in conformity with the policy of the State to encourage and uplift the downtrodden in the matter of employment. Looking to the particular circumstances narrated by the petitioner, his case deserves consideration. Therefore, I am clearly of the opinion that the respondents has not consdiered the case of the petitioner properly.

7.4 It is also required to be noted that whenever some relaxation is to be given to any candidate, the first thing to be considered is with regard to age, then experience and lastly with regard to educational qualification. Even though the petitioner is hailing from Scheduled Caste community, the petitioner has not sought for any concession in so far as his merit or educational qualifications are concerned. In fact the petitioner was at serial no.7 in the select list which

established his merits for the post. What the petitioner requested for is the relaxation in his age which he is eligible under the rules and therefore, I am of the view that the case of the petitioner deserves to be accepted even on this count.

7.5 The petitioner has pointed out that in identical circumstances one Shri Dahyabhai Morarbhai Patel was appointed by the Government as Supervisor, now known as Additional Assistant Engineer at the age of about 37 years. The said person was given relaxation in age in similar circumstances. Likewise, in similar circumstances, vide order dated 19.3.1993 one Kapoor was also appointed by the Government in pursuance of the order of this Court. Therefore, I do not find any reason not to extend similar treatment to the petitioner also, especially when the petitioner is fully qualified for the post in question who is hailing from Scheduled Caste community.

7.6 The advertisement for the said post was published as a special advertisement to fill up the backlog of posts reserved for Scheduled Caste and Scheduled Tribe. 22 posts were reserved for Scheduled Caste candidates. The petitioner is a Scheduled Caste candidate. Therefore as per Rule 16B Savings, no conditions in the rules will affect the relaxation of age limit in respect of persons belonging to the Scheduled Caste, Scheduled Tribes and other backward classes in the State. Under the circumstances, in my opinion, Rule 8(5-A)(2) cannot be pressed into service to the facts of the case and therefore there cannot be any question of the person working on the post which is in the same line.

7.7 Even otherwise, a bare reading of Rule 8(5-A)(2), it is clear that only the persons who are on the next lower post from which an employee can be promoted to the post so advertised. This would amount to saying that only on the lower post in the same line would be eligible to get age relaxation and other persons, even though qualified, would be denied the same even though they are qualified for being appointed to the said post.

8.1 Mr. Upadhyay, relied upon a decision of the Supreme Court in the case of The Comptroller & Auditor General Vs. K.S. Jagannathan, reported in AIR 1987 SC 537. Para 20 of the said decision reads as under:

> "20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ

> of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

8.2 Relying upon the said decision Mr. Upadhyay submitted that the respondents have not exercised the discretion conferred upon the Government in a proper and lawful manner and therefore this is a fit case to cause interference in the present petition.

9.0 In view of the above discussion it is very clear that the respondents have not properly considered the application of the petitioner dated 23.9.1997 and have committed an error in rejecting the said application. I am, therefore, of the opinion that the petition deserves to be accepted.

10.0 In the result, the petition is allowed. The impugned letter dated 1st August 1997 is quashed and set aside. The respondent authority is directed to accept the candidature of the petitioner for the post of Assistant Engineer (Civil) and to consider his name for appointment on the said post on the basis of the recommendation made by GPSC vide its letter dated 25.3.1997. This exercise shall be done within a period of one month from the date of receipt of writ of this Court. It is clarified that the appointment shall be made with effect from the date on which the other

candidates selected along with the petitioner as per the select list were appointed. Rule is made absolute accordingly with no order as to costs.

[K.S. JHAVERI, J.]

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